Office-Supreme Court, U.S.
FILED
SEP 6 1983
ALEXANDER L. STEVAS,
CLERK

83-393

No.: _____

IN THE

Supreme Court of the United States

October Term, 1982

ARMAND CASORIA,

Petitioner,

- *vs.* -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT F. KATZBERG
Attorney for Petitioner
233 Broadway
New York, New York 10279
(212) 964-9666

Questions Presented

1. Did the cross-examination of Petitioner which elicited evidence of guilt by association deny Petitioner a fair trial?

2. Should the Second Circuit's standard concerning evidence of guilt by association be made to conform with the other federal circuits?

3. Did the introduction of a twelve-year-old similar act, pursuant to Rule 404, F.R.E., deny Petitioner a fair trial?

Table of Contents

Questions Presented i

Opinion Below 2

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2

A. The Government's Case 2
B. The Defense Case 6

Reasons for Granting the Writ 6

Point I -- The Cross-Examination of Petitioner Concerning His Association and Relation With Known Narcotics Dealers Was Reversible Error, Requiring a New Trial.
The Opinion of the Second Circuit Is Contrary to Its Own Previous Case Law and the Rule in Other Circuits 6

Point II -- The Introduction of an Almost Twelve-Year-Old Similar Act Denied Petitioner a Fair Trial 11

Conclusion 16

Appendix A -- Opinion of United States Court of Appeals 1a

Table of Authorities

Cases:

Kotteakos v. United States,
328 U.S. 750 (1948) 11

United States v. Crawford,
438 F.2d 441 (8th Cir. 1971) 7, 8, 9, 10

United States v. Enriquez,
293 F.2d 788 (9th Cir. 1961) 7

United States v. Figueroa,
618 F.2d 934 (2d Cir. 1980) 12, 13, 14

United States v. Halper,
590 F.2d 422 (2d Cir. 1978) 12

United States v. Lyles,
593 F.2d 182 (2d Cir. 1979) 12

United States v. Manafzadeh,
592 F.2d 81 (2d Cir. 1979) 12

United States v. Mohel,
604 F.2d 748 (2d Cir. 1979) 12

United States v. Ochoa,
609 F.2d 198 (5th Cir. 1980) 7, 9, 11

United States v. Papadakis,
510 F.2d 287 (2d Cir.), *cert. denied,* 421 U.S.
950 (1975) 11

United States v. Romo,
669 F.2d 286 (5th Cir. 1982) 7

United States v. Singleterry,
646 F.2d 1014 (5th Cir. 1981) 7

United States v. Tomaiolo,
249 F.2d 683 (2d Cir. 1957) 7

United States v. Turcotte,
515 F.2d 145 (2d Cir.), *cert. denied,* 423 U.S.
1032 (1975) 11

United States Constitution:
Fifth Amendment 2
Sixth Amendment 2

Statutes:
21 U.S.C. § 812 1
21 U.S.C. § 841(a)(1) 1
21 U.S.C. § 841 (b)(1)(A) 1
21 U.S.C. § 846 1
28 U.S.C. § 1254(1) 2

Other Authorities:
Rule 403 F.R.E. 13
Rule 404 F.R.E. i
Rule 404(b) F.R.E. 11, 12, 13
Rule 609 F.R.E. 13

No.:_____

IN THE

Supreme Court of the United States

October Term, 1982

ARMAND CASORIA,

Petitioner,

· *vs.* ·

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, ARMAND CASORIA, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him on July 18, 1983, which affirmed a district court judgment convicting petitioner of conspiracy (with others unknown) to possess and distribute narcotics and an attempt to do so, in violation of Title 21, United States Code, Sections 846, 812, 841 (a)(1) and 841 (b)(1)(A). He is currently serving the twelve year period of incarceration imposed by the trial judge.

Opinion Below

The Second Circuit Court of Appeals affirmed each of the judgments of conviction in a non-published opinion, *United States v. Casoria*, dated July 18, 1983. The opinion of the Court of Appeals is annexed hereto as Appendix "A".

Jurisdiction

The judgment of the Court of Appeals was entered July 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Constitution of the United States, Fifth Amendment:

> "No person shall be...deprived of life, liberty, or property, without due process of law...."

Constitution of the United States, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statement of the Case

A. The Government's Case

The Government presented, in substance, a one witness case against petitioner. That witness was Louis Boyce, an informant cooperating with the Government and awaiting sentence on a federal narcotics charge

(Tr. 21-23).[1] Boyce, who had spent much of his life in prison on murder and narcotics charges, began to cooperate after his most recent narcotics arrest in February, 1982 (Tr. 15-19). In return for this cooperation he received financial assistance from the Government, including the payment of his food, rent and telephone bills (Tr. 15-21, 101-103). In addition, Boyce was promised that the Government would inform his sentencing judge about his cooperation and "that people very close to [him] would not be prosecuted for any charge or brought before the courts" (Tr. 23A).

Boyce began his testimony about the allegations in the indictment by telling the jury that he first met petitioner in 1970 (Tr. 27); that, thereafter, in the Summer of 1981, after not having seen Casoria in ten years, they renewed acquaintances. They had a "normal conversation" (Tr. 31). Later, in the Fall of 1981, Boyce approached petitioner seeking to buy two kilos of heroin, but the price quoted by petitioner was "very high" and nothing could be done (Tr. 32). According to Boyce, Casoria promised "we'll see each other as things change and fluctuate" (Tr. 32). Boyce "stopped by" again in early December, 1981 but there was no change in the price (Tr. 32-33). In early March, 1982 Boyce returned to petitioner's apartment. A number of other people were present at that time. Over defense objection, the prosecutor elicited that Boyce recognized one of these people, "Vinnie Pacelli" (Tr. 35-39). In response to the prosecutor's question how he knew Pacelli, and over defense objection, Boyce testified he knew Pacelli "from Atlanta Prison" (Tr. 39). Neither Pacelli nor any of the others participated in the conversation that ensued between Boyce and Casoria (Tr. 40). That conversation did not involve narcotics (Tr. 40-41). Thereafter on March 12,

---

[1] Numbers preceded by "Tr." refer to minutes of the trial transcript. Numbers preceded by "PT." refer to minutes of a pre-trial conference and arraignment on the morning of trial, February 14, 1983.

1982 Boyce returned to Casoria's apartment (Tr. 41-42). On this occasion, rather than trying to buy narcotics from petitioner as he had testified earlier, Boyce tried to sell Casoria two kilograms of heroin. Petitioner, however, refused to agree to Boyce's price. When Boyce reduced the price, Casoria told him he would let him know (Tr. 42-44). On March 15, 1982 Boyce returned to petitioner's apartment, this time, apparently, to purchase not sell. However, Casoria told Boyce that only "garbage" was available (Tr. 45-46). Boyce quoted petitioner as saying that if he could meet a price of $150,000 per kilo (some $35,000 less than Boyce's original asking price) they could do business (Tr. 49). Thereafter, on March 25, 1982 Boyce returned to petitioner's apartment, wearing a hidden recorder.[2] Again, petitioner advised that only "garbage" was around and therefore, nothing was happening and nothing could be done (Tr. 49-52). On April 14, 1982 in a conversation secretly recorded by Boyce and played to the jury (Govt. Exhibits 1A and 1B, Tr. 66), they discussed Boyce's buying one kilogram of heroin for $170,000 (Tr. 61), and agreed to meet on April 19 to conduct the transaction. On April 19, 1982, Boyce met petitioner. This meeting was likewise, secretly recorded by Boyce (Govt. Exhibits 2A and 2B, Appendix D). Casoria informed Boyce that he went to "the guy" to buy "two and a half".[3] However, the quality was very bad (Tr. 73), the weight was short and they got into a "beef" (Tr. 148-150). Therefore, petitioner would not make a deal with the "guy" and could not be sure "what's gonna happen..." (Govt. Exhibit 2B, Appendix D). They met again on April 26, 1982.[4] Once again, petitioner advised that only "bad stuff" and "garbage" was around and nothing was happening (Tr. 75-75, 153). Boyce, anxious to get something for the Agents, asked petitioner for a

---

[2] The recording device apparently did not operate and the conversation was not produced at trial (Tr. 54).

[3] Casoria and Boyce had only discussed the sale of one kilogram of heroin (Tr. 61).

[4] This meeting was not recorded (Tr. 74).

sample of even the "bad stuff" (Tr. 75, 154). He never got it (Tr. 154-155). On May 4, 1982, they met again, but as in the past, petitioner advised that nothing could be done because only "bad goods" were available (Tr. 78) and that nothing was happening (Tr. 155). Their next meeting took place on May 24, 1982 with Boyce secretly recording the conversation (Tr. 79). That conversation was played for the jury (Govt. Exhibit 3A and 3B, Tr. 79-81). Again, Casoria stated that nothing was happening (Govt. Exhibit 3B, Tr. 157-158). Their last meeting took place on August 18, 1982. It was not recorded. Despite the fact that this was their longest conversation (Tr. 83), they "did not talk too much about drugs that night" (Tr. 83).

On cross-examination Boyce admitted that even though he did everything possible to bring about a transaction (Tr. 138), to either buy or sell (Tr. 158-159), all he ever got from Casoria was "mights, maybe's and possibilities" (Tr. 151-152). Thus, despite Boyce's best and repeated efforts over a one year period to get petitioner to buy, sell or produce even a sample of narcotics, nothing ever occurred (Tr. 151-159).

In stark contrast to the "nothing is happening" non-events relative to the charges in the indictment, Boyce also testified to "similar act" transactions allegedly occurring between him and Casoria some eleven and twelve years prior. Boyce told the jury, over defense objection, that in 1970 and 1971 he sold Casoria a total of two hundred kilograms of 95% pure heroin, for millions of dollars (Tr. 27-30). The jury was later instructed, over defense objections, that they were to consider this evidence solely "in terms of background" (Tr. 118).

The only other Government witnesses were DEA Agent William Snipes, who testified to the surveillance of the meetings between Boyce and petitioner (Tr. 175-207), and Robert Brady who testified to the electronic enhancement of the tape recorded conversations (Tr. 170-173). At the close of the Government's case, the trial judge characterized the evidence as "slim" (Tr. 213).

B. The Defense Case

Petitioner testified on his own behalf and denied he ever intended to engage in narcotics transactions with Boyce. He told the jury that he merely led Boyce on because he was physically afraid of Boyce, given Boyce's "bad reputation in the streets" (Tr. 227). On cross-examination, the prosecutor elicited, over defense objection, that petitioner knew or was related to three convicted narcotics dealers (Tr. 246-249, 265, 267). Despite the fact that none of these three people had been mentioned by petitioner in his direct testimony, this was permitted on the theory that petitioner had "opened the door" by stating he was afraid of Boyce (Tr. 244-245).

Reasons for Granting the Writ

Point I

The Cross-Examination of Petitioner Concerning His Association and Relation With Known Narcotics Dealers Was Reversible Error, Requiring a New Trial.

The Opinion of the Second Circuit Is Contrary to Its Own Previous Case Law and the Rule in Other Circuits.

The Government's uncalled for and repeated interrogation of petitioner on cross-examination regarding his relationships with three convicted narcotics violators produced inflammatory and improper evidence of guilt by association. This questioning was permitted over repeated and strenuous objection of defense counsel (Tr. 245, 248, 249, 266, 267).

The Government elicited on cross-examination that petitioner knew Vincent Pacelli, that Pacelli was convicted of a narcotics offense and intimidating a witness, and had spent eighteen years in jail (Tr. 247-249); that he knew another convicted narcotics dealer, Willie Irizarry (Tr. 249, 265-266); and that his brother-in-law, Michael Recucci, was a prior convicted narcotics felon

(Tr. 266-267). No predicate existed for any of this evidence. Indeed, none of these men were even mentioned during Casoria's testimony on direct examination.

The Government blatantly violated the "long established rule that a defendant's guilt may not be proven by showing that he associates with unsavory characters." *United States v. Singleterry*, 646 F.2d 1014, 1018 (5th Cir. 1981). Even with a curative instruction and overwhelming evidence of guilt (both lacking in the instant case)[5] the interjection of such highly prejudicial evidence of "guilt by association" constitutes reversible error. *United States v. Romo*, 669 F.2d 286, 289-290 (5th Cir. 1982). A review of the case law on this point discloses that prior to the Second Circuit's decision in the instant case, the Circuit Courts of Appeal have uniformly held that prosecution questioning of a defendant on cross-examination about his relationships with others convicted of crimes requires reversal. *United States v. Ochoa*, 609 F.2d 198, 204-205 (5th Cir. 1980); *United States v. Crawford*, 438 F.2d 441, 444-446 (8th Cir. 1971); *United States v. Enriquez*, 293 F.2d 788, 794 (9th Cir. 1961); *United States v. Tomaiolo*, 249 F.2d 683, 687-689 (2d Cir. 1957). Indeed, the Second Circuit's opinion in Casoria establishes a new rule in the Second Circuit, one which is now in direct conflict with the other circuits.

The Government contended at trial that the questioning on cross-examination was proper because the defendant had somehow "opened the door" on direct examination by testifying to his fear of informant Boyce. This position is patently erroneous. Casoria testified on direct examination that he had a "fear" of Boyce because of Boyce's reputation on the streets (Tr. 227). This reputation related to "physical harm", not Boyce's narcotics conviction.[6]

---

[5] In contrast, the trial judge characterized the Government's case against Casoria as "slim" (Tr. 213).

[6] Clearly Boyce's reputation was well-deserved as he had served a substantial prison term for murdering a police officer (Tr. 15).

Q. What do you mean by "fear"?
A. Well, he had a bad reputation in the streets.
Q. Just exactly what is it you were afraid of?
A. Physical harm, I think it was, I am referring to (Tr. 227).

Based upon this portion of appellant's testimony on direct, the trial judge allowed the prosecutor, over defense objection, to explore appellant's association and/or family relationship with three narcotics violators, agreeing that the "door" had somehow been opened (Tr. 244-245). No limiting instruction was given. Appellant, however, never referred to Pacelli, Irizarry, or Recucci on direct examination and thus the "open door" never existed to permit inquiry into his association or family relationship with these individuals and their narcotics convictions. The disclosure that the three "associates" had criminal records for narcotics violations in no way tended to disprove the issue allegedly opened on direct, i.e., that Casoria might actually be fearful of Boyce, but to the contrary, only demonstrated that Casoria associated with, and was related to, convicted narcotics dealers. This placed "a shroud of suspicion over the defendant and his knowledge of the drug traffic". *United States v. Crawford, supra.*

On appeal the Government switched positions and argued that the "door" was "opened" during cross-examination.

> On direct examination, Casoria attributed his fear of Boyce to Boyce's reputation as a violent person. On cross-examination, questioning by the Government elicited from Casoria the further elaboration that he knew Boyce was a convicted narcotics dealer and had spent time in prison. The Government contends that Casoria's responses to this questioning "opened the door" to questions about his relationship with other convicted narcotics dealers who had served time in prison. Appendix A at page 4.

Thus the Court acknowledges what the Government conceded, that the "door" was never "opened" on direct. Instead, it relies upon the prosecutor's cross-examination, which the Court admits "strained a bit", to open the door. *Id.* at 5. The Second Circuit's opinion is thus in direct conflict with opinions of the Fifth and Eighth Circuits which expressly limit impeachment by evidence of association to those matters expressly brought out on direct. *United States v. Ochoa, supra; United States v. Crawford, supra.* In *Ochoa,* the prosecutor cross-examined the defendant on the drug problems of a friend, his brother, and his brother-in-law. The Government claimed the defendant opened the door on direct examination. The Court ruled that the defendant only referred to one of these people on direct and only in a limited way. Thus, since the defendant himself never offered testimony on direct as to *these people* (such as saying they were good people) the door was not opened to permit questioning concerning the details of those relationships. As the Court stated, the rule in the Fifth Circuit is that the open door argument is limited to matters *affirmatively disclosed on direct examination. Ochoa, supra* at 204. The Eighth Circuit rule is the same as the Fifth. A defendant, under certain circumstances, can be questioned about those people *he testified about on direct,* but only those individuals. "Cross-examination must either clarify the point [raised on direct] or tend to directly impeach [the witness] on that point." *Crawford, supra* at 445.

Not only does the Second Circuit erroneously rely upon the cross-examination rather than the direct examination to afford a suitable basis for impeachment by association, the cross-examination relied upon by the Court to "open the door" in no way does so. All the cross-examination in the instant case elicited was that petitioner knew Pacelli, Irizarry and Recucci, that they were convicted narcotics felons and Casoria was not afraid of them (Tr. 246-250, 265-267). Indeed, the Court acknowledges that the Government "strained a bit" to elicit evidence of petitioner's associations. Appendix A, pages

4-5. Despite the "strained" attempt on cross-examination, the Court concludes that even though petitioner "did not squarely claim" to be afraid of Boyce because he was a narcotics dealer and had gone to jail, somehow the jury *may have* understood him to be saying so. How the jury *may have* reached such a conclusion is not even hinted at in the Court's opinion, nor is this speculation supported by the record. Indeed, it is contradicted by the Court's own prior statement that Casoria testified he was afraid of Boyce because of "Boyce's reputation as a violent person." Appendix A, page 4. "In any event", concludes the Court, the evidence of association "could not possibly have a prejudicial effect", given the other evidence in the case. *Id.* at 5. This conclusion, in the context of a one witness case which the trial judge characterized as "slim" (Tr. 312) is simply astonishing. The Second Circuit's "harmless error" rationale is not only impossible in light of the trial judge's assessment of the Government's case, but is contrary to the Fifth Circuit's position that the "prejudicial impact" of evidence of guilt by association is considered "so severe" that no claim of harmless error can be sustained, even with a Government case of sufficient strength. *Crawford, supra* 446. Thus the Second Circuit has again placed itself in direct conflict with the Eighth Circuit.[7]

The doctrine rejecting the type of questioning permitted in this case has been the rule in virtually all

---

[7] It should be noted in this regard, that the cross-examination complained of herein was widespread and was conducted over two separate days of a three day trial. During the first day the prosecutor elicited testimony about Pacelli's conviction as a narcotics dealer, and his eighteen year sentence for narcotics (Tr. 246-248). Also covered was petitioner's knowledge of Willie Irizarry and questions whether petitioner ever dealt drugs with Irizarry (Tr. 249-250). On the next day, the prosecutor returned to this line of inquiry, eliciting evidence of Irizarry's prior narcotics conviction (Tr. 265-266). Thereafter, the prosecutor questioned petitioner about his brother-in-law, Michael Recucci, who was convicted and sent to prison for a narcotics violation in 1974 (Tr. 266-267). Defense counsel's repeated objections to this cross-examination were overruled. (E.g. Tr. 245, 246, 248, 266).

circuits. As the Court in *Ochoa*, stated: "This practice of the Fifth Circuit excluding convictions of associates and kin in cross-examination of a defendant is consistent with the practice in other circuits." *Ochoa, supra* at 205. The *Ochoa* Court cites other circuits with approval, *supra* (fn3), including the Second Circuit in *United States v. Turcotte*, 515 F.2d 145 (2d Cir.), *cert. denied*, 423 U.S. 1032 (1975). The Second Circuit, however, has seen fit to abandon this practice in Casoria and has set out on new and dangerous ground. The Court has permitted this blatant use of guilt by association without citing a single case in support of its legal analysis and without referring to any portion of the record to support its factual conclusions. There can be no doubt that the error in permitting the tarring of petitioner by the broad brush of guilt by association had a substantial influence on the outcome of the "slim" case against petitioner. As such, the conviction cannot stand. *Kotteakos v. United States*, 328 U.S. 750, 765 (1948).

It is respectfully submitted that a writ of certiorari be issued both to allow petitioner to obtain a new and fair trial, and to return the Second Circuit to harmony with the other circuits concerning cross-examinations of this type.

Point II

The Introduction of an Almost Twelve-Year-Old Similar Act Denied Petitioner a Fair Trial.

Rule 404(b), F.R.E., which governs the admissibility of "other crimes" evidence, specifically precludes admission of such evidence to prove "the character of the person in order to show that he acted in conformity therewith." Thus, it has long been the rule that similar act evidence cannot be offered "solely to prove criminal character." *United States v. Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). In recent years the Second Circuit has set forth clearly defined standards and procedures that must be followed when

similar act evidence is proferred. *United States v. Halper*, 590 F.2d 422, 432 (2d Cir. 1978). A two part test must be satisfied as a threshold for admissibility. "To be admissible, the evidence must be relevant to some disputed issue in the trial, Fed. R. Evid. 404(b), and its probative value must not be substantially outweighed by the risk of unfair prejudice." *United States v. Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980). See, *United States v. Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States v. Lyles*, 593 F.2d 182 (2d Cir. 1979); *United States v. Manafzadeh*, 592 F.2d 81 (2d Cir. 1979).

Unfortunately, the Boyce testimony about his alleged dealings with Armand Casoria in 1970 and 1971 was not offered by the Government to prove some disputed issue in the case, but to prove the "background" and "prior relationship" between Boyce and Casoria (PT. 13-14). And it was precisely on the sole basis of demonstrating the alleged "background" between Boyce and Casoria that this evidence was admitted (Tr. 118). Defense counsel's objection to this instruction was overruled (Tr. 119).[8] The jury was instructed at the close of the case that the testimony of the alleged 1970 and 1971 transactions between Boyce and Casoria were to be considered as background (Tr. 347).

Moreover, despite defense counsel's attempts to have the Government meaningfully address, and the Court appropriately evaluate the prejudicial effect of the proferred "similar act" evidence, this did not occur (PT. 16-19). The admission of the similar act testimony thus disregarded both aspects of the Second Circuit's two-prong test for admissibility: it was not offered as to some disputed issue in the case, and there was no weighing of its probative value against its prejudicial impact. *Figueroa, supra* at 939. Failure "to consider the risk of unfair prejudice and balance this risk against probative value" constitutes reversible error when, given a

---

[8] Defense counsel's earlier request for a limiting instruction at the time the similar act testimony was being introduced was likewise, denied (Tr. 31-32).

proper analysis of these facts, the former outweighs the latter. *Figueroa, supra*, 942-43. A proper and complete analysis of the admissibility of Boyce's testimony concerning his alleged dealings with Casoria some twelve years in the past would necessarily preclude its admission for the following reasons.

1. The events were too remote in time. The alleged "similar act" transactions were eleven and twelve years old. While the Government's position that the ten year bar applies only to Rule 609, F.R.E. (PT. 13) is essentially correct, that does not mean that the remoteness issue has been removed. Both Rule 609 and Rule 403, F.R.E. oblige the trial court to assess the probative value of all prior crimes offered in evidence and *remoteness is always pertinent to that assessment*. With crimes over ten years of age, the probative value must substantially outweigh its prejudicial effect. *Figueroa, supra* at 942.

2. The prejudicial impact of the "similar act" testimony was devastating. Boyce testified to having actually sold Casoria two hundred kilograms of heroin during a six month period in 1970 and 1971. One of those sales alone was for one hundred kilograms, at a price of one and a half million dollars (Tr. 28-30). When contrasted to the inchoate crimes charged in the indictment, wherein Boyce for almost one year tried repeatedly and unsuccessfully to have Casoria either buy or sell *one kilogram* of heroin, the "similar act" evidence was crucial and devastating. The prejudicial impact of testimony that Casoria bought millions of dollars of heroin cannot be overstated, and more than outweighed any marginal probative value of such testimony.

3. The probative value of the similar act evidence was minimal at best. Indeed, the testimony only served to tell the jury that Armand Casoria was a major narcotics dealer long before he was ever indicted. The evidence was not proferred concerning a disputed issue delineated in Rule 404 (b), such as motive, knowledge or identity, and, as such, should not have been admitted.

Given the twelve year old similar act involved herein, the test for admissibility is especially difficult to meet, i.e., *the probative value of such evidence must substantially outweigh its prejudicial impact. Figueroa, supra* at 942. Here the devastating impact far outweighed the marginal probative value. Unfortunately here as in *Figueroa*, "the trial judge failed to consider the risk of unfair prejudice and to balance the risk against probative value." *Figueroa, supra*. Had the District Judge considered these factors, his ruling on this evidence would necessarily have been different.

It is clear that the Government proceeded as it did because its case was razor thin; it needed this devastating testimony not to show Casoria's alleged prior relationship and background with Boyce, but to tell the jury that despite the fact no narcotics was ever produced in this case, Armand Casoria was a major drug dealer, a man of bad character, acting true to his nature. No reasonable juror could miss the point. This is just what the "similar act" cases cited above expressly prohibit.[9]

4. The instructions given to the jury concerning the similar act testimony were improper and only served to reinforce the impression that this evidence was admitted to present the background of Armand Casoria, i.e., that he was a major drug dealer. The day Boyce testified to the similar act the jury was told "(t)he only purpose for you to consider that is in terms of background and for you to take in terms of that testimony, for you to view it as background against which you can weigh his testimony about his transactions or conversa-

---

[9] This unfortunate impression was only reinforced by the cross-examination of petitioner wherein without justification, his association with three men convicted of narcotics offenses was brought out. In addition, during the direct examination of Boyce, it was elicited that one of these men, Pacelli, was present in March, 1982 when Boyce was permitted to testify that he knew Pacelli "from Atlanta Prison" (Tr. 38-39). Thus, the prejudicial impact of the similar act testimony, as prejudicial as it was in isolation, was even more devastating when viewed in relation to other evidence in the case.

tions with Mr. Casoria during the period that is covered by this indictment. That is the sole purpose for it." Tr. 118 [10]

It must be pointed out in this regard, that the similar act evidence in this case is not inherently reliable like a prior conviction. We are confronted instead with a cooperating witness' recollection of events allegedly occurring twelve and thirteen years prior to his testimony. Given the passage of time and Boyce's implicit motive and opportunity to fabricate, his testimony must be viewed with extreme caution. As such, the questionable reliability of the similar act evidence both detracts from its probative value and adds to the prejudicial nature of its use.

The Second Circuit's opinion in Casoria states that the balancing was a matter "committed to the District Court's discretion." Appendix A at page 4. Unfortunately, the trial judge never performed the balancing test, nor did the Second Circuit in its opinion. A proper administration of the balancing test necessarily excludes the evidence in question because its probative value does not substantially outweigh its prejudicial impact. The record is devoid of any reference to the trial judge discussing the prejudicial impact as against the probative value of this evidence, let alone is there any indication that the proper balancing standard was employed.

It is, accordingly, respectfully submitted that a writ of certiorari be issued to allow petitioner to obtain a new and fair trial.

---

[10] Defense counsel's objections thereto were overruled (Tr. 118-19).

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Dated: New York, New York
September 6, 1983

ROBERT F. KATZBERG
Attorney for Petitioner
233 Broadway
New York, New York 10279
(212) 964-9666

APPENDIX

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-1121

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and eighty-three.

UNITED STATES OF AMERICA,
Appellee,

v.

ARMAND CASORIA,
Defendant-Appellant.

Present:

HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.

HONORABLE HERBERT N. MALETZ,
Judge, U.S. Court of International Trade, sitting by designation.

ORDER

Armand Casoria appeals from a March 31, 1983, judgment of the District Court for the Southern District of New York (Robert L. Carter, Judge) convicting him,

---

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

upon a jury verdict, of conspiring with persons unknown to the Grand Jury to distribute heroin, in violation of 21 U.S.C. § 846, and of attempting to possess heroin with intent to distribute, also in violation of 21 U.S.C. § 846. Casoria contends that the evidence was insufficient to support the verdict or to establish proper venue, that certain prior crime evidence was improperly admitted, and that the Government improperly inquired on cross-examination into Casoria's prior association with criminals. For the reasons set forth below, we affirm the judgment of conviction.

The Government's principal witness was Boyce, a convicted narcotics dealer who was acting as an informant. In early March, 1982, Boyce contacted Casoria, to whom he had previously sold substantial amounts of heroin. Over the weeks following their initial meeting, Boyce and Casoria met several times in Casoria's Manhattan apartment, which he maintained in addition to a New Jersey residence where he lived with his family. During each meeting, Boyce and Casoria discussed the availability of high-quality heroin and considered possible narcotics transactions. On March 15, Casoria told Boyce that he had been purchasing heroin at a price of $155,000 per kilogram. He also told Boyce that heroin of acceptable quality was not then available. On March 25, Casoria told Boyce that acceptable heroin remained unavailable but that Boyce should check back in two weeks. On April 14, Casoria stated that he had lined up heroin at $150,000 to $160,000 per kilogram and that he would resell this heroin to Boyce for $170,000 per kilogram. Boyce agreed to purchase one kilogram of heroin on these terms, and he and Casoria decided that they would meet on April 19 at a specified corner in the upper east side of Manhattan to complete this transaction. When the two men met as planned on April 19, Casoria said that he had tried to purchase the heroin for resale to Boyce but that he had "got in a...beef" with his supplier and abandoned the deal after he determined, by weighing and testing the heroin, that it was short-weighted and impure. Boyce recorded the

April 14, 1982, and April 19, 1982, conversations, and the tapes were played in full for the jury.

1. The evidence was sufficient to support the conviction of the conspiracy count. Casoria's March 15, 1982, statement that he was paying $155,000 per kilogram of heroin, in the context of this and subsequent conversations, permitted the inference that he had a well-established and continuous relationship with a supplier. His March 15 and March 25 statements regarding the scarcity of high-quality heroin permitted the inference that he had conferred with his supplier before his discussions with Boyce. These inferences, together with the definiteness of the commitment that Casoria made on April 14, entitled the jury to conclude that sometime prior to April 14 Casoria had reached an agreement with his supplier to purchase heroin for resale to Boyce.

2. The evidence was sufficient to support the conviction on the attempt count. To prove an attempt, the Government must establish that the defendant intended to engage in criminal conduct and that the defendant had taken a "substantial step" toward the commission of the substantive offense. *United States v. Ivic*, 700 F.2d 51, 66 (2d Cir. 1983). The Government met its burden on both of these elements when it introduced the tape of the April 19 conversation in which Casoria stated that he had gone to his supplier to obtain heroin for resale to Boyce and that he had abandoned the deal only after determining that the heroin was short-weighted and not of acceptable quality. *See United States v. Mandujano*, 499 F.2d 370 (5th Cir. 1974), *cert. denied*, 419 U.S. 1114 (1975); *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

3. The passing reference to the uncertain location of the crimes, included in Casoria's Rule 29 motion, may well have been insufficient to preserve the venue claims for appeal. *See United States v. Rivera*, 388 F.2d 545,

547-48 (2d Cir.), *cert. denied*, 392 U.S. 937 (1968). Even if they were preserved, however, those claims lack merit. Boyce testified that he had sold over 200 kilograms of heroin to Casoria in 1971 at the same Manhattan apartment in which they met several times in 1982. In addition, when Boyce suggested that the April 19, 1982, meeting be held in the Bronx, Casoria rejected the suggestion and proposed that they meet in Manhattan. Absent any indication that Casoria ever engaged in narcotics transactions outside of Manhattan, it was fairly inferable from this evidence that Manhattan served as Casoria's base of operations and that Casoria's attempt to purchase heroin from his supplier took place within Manhattan. *See United States v. Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977); *United States v. Leong*, 536 F.2d 993, 996 (2d Cir.), *cert. denied*, 429 U.S. 924 (1976). Moreover, because a crime involving a continuous course of conduct may be tried wherever it was "begun, continued, or completed," *United States v. Busic*, 549 F.2d 252, 259 (2d Cir. 1977), the April 14, 1982, meeting, which was in furtherance of the conspiracy, supplied an additional basis for venue on the conspiracy count. The evidence sufficed to establish that the case was properly tried in the Southern District.

4. The District Court did not err in admitting evidence showing that between April and September of 1971 Boyce had sold over 200 kilograms of high-purity heroin to Casoria. Initially, this evidence was properly admitted to show the "background and development" of the conspiracy, *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, 429 U.S. 1091 (1979), and, in particular, to show how Boyce, who had been arrested in December 1971 and incarcerated until 1979, could so readily initiate large-scale dealings with Casoria. When Casoria contended that he never had any intention of selling narcotics to Boyce, the evidence also became available for the jury to consider on the issue of intent, as the District Court correctly charged.

Fed. R. Evid. 404(b). The balancing of probative value against prejudicial effect was a matter committed to the District Court's discretion, especially since the evidence of the 1982 dealings already showed the jury that Casoria was involved in large-quantity transactions.

5. Finally, there is no basis for reversal because the District Court permitted the Government to question Casoria regarding his prior association with known drug dealers. Casoria's defense, expressed by counsel in his opening statement, was that he never intended to sell narcotics to Boyce and that he was pretending to cooperate with Boyce because he was afraid of him. On direct examination, Casoria attributed his fear of Boyce to Boyce's reputation as a violent person. On cross-examination, questioning by the Government elicited from Casoria the further elaboration that he knew Boyce was a convicted narcotics dealer and had spent time in prison. The Government contends that Casoria's responses to this questioning "opened the door" to questions about his relationship with other convicted narcotics dealers who had served time in prison. The Government contends these questions fairly rebutted the inference that Casoria feared Boyce because of these same characteristics. Casoria did not squarely make such a claim, though perhaps the jury may have understood him to be making that claim. In any event, even if the Government strained a bit to elicit evidence that Casoria associated with drug dealers, that evidence could not possibly have a prejudicial effect after the jury had heard Casoria on tape recounting his own extensive dealings with suppliers of large quantities of heroin.

The judgement of conviction is affirmed.

_____

_____

Circuit Judges.

_____

Judge, U.S. Court of Internatl. Trade